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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 577

MICHAEL W. McCRANIE, BY HIS NEXT FRIEND
MRS. VIRGINIA SMITH McCRANIE,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. ALTON HOSCH,
JOHN L. GREEN,
Counsel for Petitioner.

JAMES BARROW,
RUPERT A. BROWN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

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No. 577

MICHAEL W. McCRANIE, BY HIS NEXT FRIEND
MRS. VIRGINIA SMITH McCRANIE,
Petitioner and Appellant Below,

vs.

UNITED STATES OF AMERICA,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Michael W. McCranie, by his next friend, Mrs. Virginia Smith McCranie, prays that a writ of certiorari issue to review the judgment entered in this case on November 6, 1952 by the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The District Court did not write an opinion. Its judgment appears on pages 28 and 29 of the Record. The opinion of the Court of Appeals (R. 50) is reported at 199 F. 2d 581.

Jurisdiction

The judgment of the Court of Appeals was entered on November 6, 1952 (R. 5). The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code (28 USCA 1254(1)).

Questions Presented

Whether personnel of a unit of the National Guard of the United States, which had not been called to active Federal Military Service by the President, but which was undergoing annual field training as required by Congress and authorized by the Secretary of the Army for the purpose of preparing it for active service in the Army of the United States and of augmenting the military strength of the United States; and who were being paid, clothed, fed, equipped, directed and controlled by the United States acting through its duly authorized executive officers, were, within the meaning of the Federal Tort Claims Act (28 USCA 1346(b), 2671), either:

(1) Employees of the United States under the usual or common law meaning of the word; or

(2) Persons acting on behalf of a Federal Agency in an official capacity, temporarily in the service of the United States; or

(3) Members of the Military Forces of the United States?

Statutes Involved

The pertinent portions of the Federal Tort Claims Act are Section 1346(b) and Section 2671 of the Judicial Code as amended (28 USCA 1346(b), 2671). They are set out in the Appendix, *infra*, pp. 18 and 19.

Statement

Michael W. McCranie, a minor three years of age, brought suit by next friend against the United States in the District

Court for the Middle District of Georgia. The suit was brought under the Tort Claims Act to recover $50,000.00 for personal injuries suffered by the Plaintiff.

Defendant filed a Motion for Summary Judgment and the Plaintiff filed a Request for Admissions which the Trial Court held to be immaterial. The case is presented, therefore, upon the theory that all of the requests would have been answered in the affirmative. The Petition, as amended, the Request for Admissions, and the Motion for Summary Judgment showed the following facts:

Pursuant to 32 USCA 62, and by authorization of the Secretary of the Army, on July 15, 1949 the Chief, National Guard Bureau authorized field training from August 14, 1949 through August 28, 1949 for the 730th Ordnance Maintenance Company, National Guard of the United States (Tennessee National Guard) (R. 43-45). Pursuant to this authorization, on July 27, 1949 the Adjutant General of Tennessee ordered the 730th Ordnance Maintenance Company to participate in field training at Fort Jackson, South Carolina during the period of time authorized (R. 37-43). The movement of a motor convoy from Jackson, Tennessee to Fort Jackson, South Carolina and its return to Jackson, Tennessee were authorized in the training authorization issued by the Chief of the National Guard Bureau, and were provided for in the orders of the Adjutant General of Tennessee (R. 44, 40). The time and place for the field training of the 730th Ordnance Maintenance Company had been verbally agreed to at a conference between the Adjutant Generals of the states comprising the Third Army Area (which includes the State of Tennessee) and representatives of the Commanding General, Third Army, the conference having been held prior to the issuance of the training authorization by the Chief of the National Guard Bureau (R. 14).

The 730th Ordnance Maintenance Company underwent

training at Fort Jackson, South Carolina, in conformity with the authorization and orders referred to above. This training was intended to prepare it for possible active service in the Army of the United States (R. 15). While at Fort Jackson, the unit was under the direction and control of the Army of the United States (R. 15, 16). The training was done in accordance with policies laid down by the Army of the United States and was intended to fit the 730th Ordnance Maintenance Company to become an integral part of the Army of the United States (R. 16). At the time of this training it was contemplated by the Army of the United States that this Country might become involved in conflict with foreign powers which would require the calling of this unit to active duty for the defense of the United States (R. 16). Between the date of the happening of the collision which gave rise of this action and the rendition of the judgment in the District Court, several units of the National Guard were in fact ordered into active service by the President of the United States to augment the Military Forces of the nation (R. 17).

During the period of field training (which included the day on which the Plaintiff was injured) the 730th Ordnance Maintenance Company was paid with funds furnished by the United States, the pay roll being made up by members of the regular Army detailed for that purpose and being certified by the United States Property and Disbursing Officer for the State of Tennessee, an officer of the United States Army on active duty and subject to the orders of the National Guard Bureau (R. 13, 14, 15). The actual disbursement of pay was made by an officer of the National Guard until who had been appointed a Class B Finance Officer by the Commanding General, Third Army (R. 15). During the period of field training the 730th Ordnance Maintenance Company was furnished food and lodging by

the Army of the United States (R. 15). All travel expenses incident to the movement of the 730th Ordnance Maintenance Company to and from Fort Jackson, South Carolina were paid by the United States, including food for the personnel and motor fuel for the vehicles (R. 16).

Prior to the expiration of the period of field training, the 730th Ordnance Maintenance Company returned by motor convoy from Fort Jackson, South Carolina to Jackson, Tennessee in conformity with orders issued by the Commanding General, Third Army, releasing it from further duty at Fort Jackson and ordering its return to Tennessee (R. 13). The convoy, on its return to Tennessee, passed through Athens, Georgia, because the route was fixed in orders issued by the United States Property and Disbursing Officer for the State of Tennessee (R. 13).

The Petitioner was injured at Athens, Georgia, on August 27, 1949 (one day prior to the expiration of the period of field training authorized) as the result of a collision between a civilian automobile and a truck which was a part of the convoy (R. 2-5). The driver of the truck was an enlisted member of the 730th Ordnance Maintenance Company and of the National Guard of the United States; and the Officer in charge of the convoy was an officer of the National Guard of the United States (R. 17). The truck involved in the collision, all of the vehicles in the convoy, and all the equipment, uniforms and weapons in possession of the 730th Ordnance Maintenance Company at the time of the collision were the property of the United States and had been issued to the State of Tennessee for the training of the National Guard (R. 12). The driver of the truck involved in the collision and the officer in charge of the convoy were subject, at the time of the collision, to the Articles of War and to the orders of the Commanding General, Third Army (R. 16).

Fort Jackson, South Carolina, is a regular Army post of the United States Army and is under the jurisdiction of the Commanding General, Third Army (R. 13). The Third Army is a portion of the regular Army of the United States, officered by officers of the Army of the United States on active duty (R. 14). The Commanding General, Third Army, supervises and controls the training of the reserve components of the Army of the United States (of which the 730th Ordnance Maintenance Company was one) in the Third Army Area, and in the performance of this function he is acting as an officer of the Army of the United States on active duty (R. 14).

At the time of the collision, neither the 730th Ordnance Maintenance Company, nor the officer in charge of the convoy, nor the driver of the truck involved in the collision had been called into the active Federal Military Service of the United States by the President (R. 10, 11, 45).

It was alleged that the driver of the truck and the officer in charge of the convoy were employees of the United States; that they were persons acting on behalf of the Army of the United States in an official capacity, temporarily in the service of the United States; that they were members of and under the direction and control of the Military Forces of the United States; that they were acting in line of duty and within the scope of their office and employment; and that the Petitioner was injured as the result of acts of negligence on the part of each of them which were specified in detail in the petition (R. 2-8, 17, 18).

The United States filed a Motion for Summary Judgment on the ground that the personnel in question were not in the active Federal military service of the United States on the date of the collision and were therefore not employees of the Government within the meaning of the Tort Claims Act (R. 10, 11). This Motion for Summary Judgment for

the United States was granted by the District Court (R. 28, 29).

Appeal was made to the Court of Appeals for the Fifth Circuit, which affirmed the Judgment of the District Court on November 6, 1952 (R. 50, 51).

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the Petitioner's Request for Admissions Nos. 3 through 33 inclusive (dealing with the direction and control exercised by the United States over the officer in charge of the convoy and the driver of the truck) related wholly to matters which were irrelevant, immaterial and therefore inadmissible, and were not designed to discover facts which would in any event be relevant, material, and admissible.

2. In holding that the Record justified a finding as a matter of law that the driver of the truck and the officer in charge of the convoy were not employees of the United States acting within the scope of their office or employment at the time of the collision within the meaning of the Federal Tort Claims Act.

3. In approving the grant by the Trial Court of Summary Judgment when it was evident that there was a genuine issue of material fact between the parties as to whether or not the officer in charge of the convoy and the driver of the truck were in fact acting in an official capacity under the direction and control of the Department of the Army to such an extent as to render the United States liable for their actions by virtue of the provisions of the Federal Tort Claims Act.

4. In affirming the judgment of the District Court.

Reasons for Granting the Writ

The decision of the Court of Appeals in this case to the effect that the United States, the real party at interest, is not liable for the torts of members of the Nationl Guard of the United States while engaged in Federally conducted field training has the effect, due to the Eleventh Amendment to the Constitution and the domestic application by the States of the doctrine of sovereign immunity, or depriving persons whose person or property is tortiously injured as the result of such training of any available judicial remedy for the wrong. It is fair to assert that, with the emphasis which has been recently placed on national defense and which will in all probability continue to be placed thereon in the foreseeable future, and with the tremendously important part that motor convoy movement plays in the transportation and in the training of soldiers, the number of persons damaged annually in accidents of the sort involved in this case has been high in the past and will continue high in the future. In the brief filed in the Court of Appeals by the United States in this case, Counsel representing the Government cited seven decisions (five of them unreported district court decisions) from the Courts of the Fifth Circuit alone in which a judicial remedy against the United States for torts committed under these circumstances was denied during the period 1950-1952. When it is remembered that these seven instances represent merely those claims which went to trail and resulted in a final judgment in one Circuit alone, it is obvious that the number of persons injured annually in occurrences of the sort involved in this case must be substantial. Manifestly, the Petitioner is unable to state in exact terms the number of persons damaged annually in their person or property by members of the National Guard of the United States while engaged in Federally controlled field training; but

this information is in the possession of the Respondent in this case; and the Petitioner hereby calls upon the Respondent when answering this petition to make known to this Court the number of persons so injured each year. It is confidently predicated that the making of this information available to the Court by the Government will amply demonstrate the public importance of the rule of Federal nonliability now sought to be put in issue.

Moreover, the decision of the Court of Appeals is in conflict with the controlling principle heretofore announced by this Court. The decision of the Court of Appeals was based on the technical and legalistic ground that the officer in charge of the convoy and the driver of the truck involved in this case had not been called into active Federal military service by the President. This interpretation of the Federal Tort Claims Act, with its emphasis on the technical legal status of the relationship between the tort feasor and the United States, and its complete disregard for the substantive factual nature of that relationship, is in conflict with the rulings of this court to the effect that the Federal Tort Claims Act is remedial in nature and that the waiver of sovereign immunity therein contained is to be liberally construed. See *United States* v. *Aetna Casualty and Surety Company*, 338 U. S. 366; and *United States* v. *Yellow Cab Company*, 340 U. S. 543.

The Tort Claims Act waives the sovereign immunity of the United States to suit on account of ". . . claims against the United States, for money damages . . . for . . . . personal injury . . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . ." (Section 1346(b) of the Judicial Code, 28 USCA 1346(b)). The act further provides, " 'Employee of the government' includes officers or employees of any Federal Agency, members of the military or naval forces

of the United States, and persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." (Section 2671 of the Judicial Code, 28 USCA 2671). It seems clear from the relation to each other of these two sections of the Act that the Congressional intention was that Section 1346(b) should render the United States liable to suit for the torts of its employees within the usual or common law meaning of the term; and that Section 2671 should operate to impose the same liability on the United States with respect to the torts of defined groups of persons who bore an intimate relationship to the United States but whose relationship might not be that of "employee" within the usual or common law meaning of the term. These groups of people who may not be employees of the United States within the ordinary or common law meaning of the word, but who, by virtue of Section 2671, are to subject the United States to liability for their torts are: (1) "Officers or employees of any Federal agency"; (2) "members of the military or naval forces of the United States"; and (3) "persons acting on behalf of a Federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation". It is the contention of the Petitioner in this case that the driver of the truck and the commanding officer of the convoy were "employees" of the United States within the usual or common law meaning of the term so as to render the United States liable for their torts under Section 1346(b); and further that they were "members of the military . . . forces of the United States" acting in line of duty as such, and that they were "persons acting on behalf of a Federal agency [the Department of the Army, in this case] in an official capacity, temporarily . . . . in the service of the United States"

so as to render the United States liable for their tor under the provisions of Section 2671.

At common law the relationship of employer and employee exists whenever, by virtue of a contract, express o implied, one person undertakes to render services for another under circumstances where, by virtue of the term of the contract, the person rendering the services is subject to the direction and control of the person for whos benefit they are rendered. These requirements are met i the case at bar. The officer in charge of the convoy was a officer of National Guard of the United States (R. 20) and as such he had been appointed by the President (se 32 USCA 18) and had been required to take a Congressionally prescribed Federal oath (see 32 USCA 112). Th driver of the truck was an enlisted member of the Nationl Guard of the United States (R. 19); and as such he ha been required to take a Congressionally prescribed oath of enlistment ". . . . as a soldier in the National Guard of the United States and of the State of ——— . . . .' (see 32 USCA 123). At the time of the accident the officer in charge of the convoy and the driver of the truck were subject to the Articles of War and were acting under the direction and control of the Commanding General, Third Army, and of the United States Property and Disbursing Officer for the State of Tennessee (R. 16, 13); and they were acting to promote the interest of the United States in accordance with legislative and executive policies of the United States. (32 USCA 62; R. 43-45, 16).

If, for the sake of argument, it be conceded that the officer in charge of the convoy and the driver of the truck were soldiers of the State of Tennessee, acting pursuant to their enlistment as members of the National Guard of Tennessee, using equipment in which the State of Tennessee had a balisee's interest, and being paid by the State of Ten-

nessee; even if all of this were true, the United States would still be liable for their torts. Under the common law, when a master lends his servant to another to be controlled by the other and to advance the interest of the other, the servant becomes by operation of law the servant or employee of such other person. See cases collected in 57 Corpus Juris Secundum 284-289. In applying the Tort Claims Act, the Federal Courts have utilized this "lent servant" doctrine to exempt the United States from liability in cases where a person indisputably an employee of the United States had been loaned by the United States to some non-Federal agency to serve the interest of that agency under its own control. See *Sanchez* v. *United States,* 177 F. 2d 452; *Fries* v. *United States,* 170 F. 2d 726 and *Cobb* v. *United States* 81 F. Supp. 9. The case at bar represents the other side of the same coin. Here the servants or soldiers of the State of Tennessee had been borrowed by the United States. That the personnel in question were under the direction and control of the United States at the time of the collision was shown by the following facts: They were, for the period of the encampment (including the day of the collision) paid directly by the United States (R. 13, 14, 15); the route they took on the day of the collision was prescribed by the United States (R. 13); the training of the personnel which was the object of the encampment (and of which training the convoy movement was an important part) was under the direction and control of the United States (R. 15, 16); and the personnel were, at the time of the collision, subject to the orders of the United States issued under authority of the Commanding General, Third Army (R. 16). The personnel were likewise acting in the interest of the United States, rather than of the State of Tennessee, as is evidenced by the fact that the training which the personnel had undergone and were undergoing

at the time of the collision was controlled and designed by the United States in order to fit the unit to become an integral part of the Army of the United States in the event of conflict with foreign powers or other necessity requiring the augmentation of the strength of the Army (R. 15, 16).

We need not rest this case on the common law alone, however, for Congress has extended the coverage of the Tort Claims Act beyond even the limits of the "lent servant" doctrine. By virtue of Section 2671, Congress has rendered the United States liable for the torts of "persons acting on behalf of a Federal agency in an official capacity". The fact that the persons now in question were acting under control of the Army and to advance the effectiveness of the Army (R. 15, 16) satisfies the requirement contained in the phrase "acting on behalf of a Federal agency". The field training of the National Guard being required by Congress (see 32 USCA 62), and the authorization by the Chief, National Guard Bureau for the 730th Ordnance Maintenance Company to participate in this training (R. 43-45), satisfy the requirement that the person acting shall not be a mere volunteer, but shall be acting "in an official capacity".

Section 2671 further makes the United States liable for the torts of "members of the military . . . forces of the United States . . . acting in line of duty . . ." The record brings the case at bar squarely within the application of this rule. The officer in charge of the convoy and the driver of the truck, as members of the National Guard of the United States (R. 19, 20), were *ipso facto* members of a reserve component of the Army of the United States (see 32 USCA 4b(b)); they were obligated to the United States by Congressionally prescribed oaths (see 32 USCA 112 and 123); and the officer in charge of the convoy held

his commission by appointment of the President of the United States (see 32 USCA 18). Under these circumstances the personnel in question were indisputably "members of the military . . . forces of the United States". They were at the place of the accident and doing the things which resulted in the injury to the Petitioner because of a chain of command which had its origin in an Act of Congress authorizing and requiring the training (see 32 USCA 62) and in the order of the Chief, National Guard Bureau, acting under authority of the Secretary of the Army, implementing this Congressional policy (R. 43-45). Furthermore, they were, at the time and place of the collision, subject to the Articles of War and to the direction and control of the Commanding General, Third Army (R. 16). Under these circumstances, it seems obvious that the persons involved in this case were acting, at the time and place of the collision, in line of duty owed to the United States by virtue of their oaths of enlistment in the National Guard of the United States; and not in line of any duty which they might have owed to the State of Tennessee.

The decision of the Court of Appeals in the case at bar is predicated upon a prior decision by the same Court which resulted from another accident which arose out of the same convoy movement as that involved in this case. See *Dover* v. *United States*, 192 F. 2d 431. The *Dover* case in turn is predicated on *Williams* v. *United States*, 189 F. 2d 607, a case from the Tenth Circuit involving substantially the same situation. All three of these cases erred in that they gave controlling importance to the fact that the personnel in question had not, at the time of the accident, been called to active military service of the United States by order of the President as authorized by law (see 32 USCA 4a, 20, 81 and 81c and 50 USCA Appendix 451(d)). The fallacy in this solution of the issue presented in the case at bar is that it establishes a stricter standard of liability than that

prescribed by Congress in the Tort Claims Act. Such a rule would mean that members of a reserve component of the Army could do nothing for which the United States would be liable until they had been called into service by the President, even though they were indubitably members of the military forces and acting in line of duty as such. There is absolutely no justification in the language employed by Congress in the Tort Claims Act for importing to the Congress such a restricted meaning. The criteria established by Congress for liability on the part of the United States are action by a member of the military forces acting in line of duty; and there is absolutely no warrant for an additional judicially created requirement that the tort feasor must have been called to active military service at the time of the tort.

Furthermore, the decision in the *Williams* case, from which the modern Federal authority all stems, is itself predicated on earlier state court decisions which antedate the complete legislative reorganization which the National Guard underwent in 1933. (See 32 USCA 4, 4a, 4b, 4b(b), 18, 112, 18(a), and 123). Prior to 1933, the military policy of the United States was based on the traditional concept of the minute man defending his own hearth with his own musket; and the relationship which existed between the United States and the National Guard (the organized Constitutional militia), in accordance with this concept, was extremely loose. The advent of the tank, the airplane and the atom bomb required a revision of this traditional military policy. The major legislative change was effected in 1933, and the effect thereof was to tighten considerably the control and supervision exercised by the United States over the National Guard of the United States. It therefore follows that decisions with respect to the nature of the relationship existing between the Federal government and the National Guard of the United States which are based

on original authority which antedates the reorganization of 1933 are inapplicable to the existing situation. The judicial concept of the relationship existing between the Federal government and the National Guard of the United States has been altered as radically by the advent of the tank, the airplane and atom bomb as has been the military concept of the minute man and his musket.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

J. Alton Hosch,
John L. Green,
Counsel for Petitioner.

Of Counsel:
James Barrow
Rupert A. Brown
Address:
419 Southern Mutual Building
Athens, Georgia

APPENDIX

Section 1346(b) of the Judicial Code as amended Apr. 25, 1949, c. 92, Sec. 2(a), 63 Stat. 62; May 24, 1949, c. 139, Sec. 80(a, b), 63 Stat. 101 (28 USCA 1346(b)) is as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2671 of the Judicial Code as amended May 24, 1949, c. 139, Sec. 124, 63 Stat. 106 (28 USCA 2671) is as follows:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

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32 U.S.C. 33 11
32 U.S.C. 49 10
32 U.S.C. 61-76 11
32 U.S.C. 81 12
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32 U.S.C. 112 10
32 U.S.C. 123 10
50 U.S.C. App. 301 12
50 U.S.C.A. 1111 7
50 U.S.C.A. 1112 7

MISCELLANEOUS:

17 Comp. Gen. 333 17
19 Comp. Gen. 326 17
Colby and Glass, *The Legal Status of the National Guard*, 29 Va. L. Rev. 839 (1943) 7
Senate Report No. 1795, 82nd Cong., 2d Sess., on the Armed Forces Reserve Act of 1952, pp. 11, 43 7
Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940) 7

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 577

MICHAEL W. McCRANIE, by his next friend, MRS. VIRGINIA SMITH McCRANIE, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The United States District Court for the Middle District of Georgia did not write an opinion. Its summary judgment in favor of the United States appears at pages 28-29 of the record. The *per curiam* opinion of the Court of Appeals (R. 50) is reported at 199 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on November 6, 1952 (R. 51). The petition for a writ of certiorari was filed on January 30, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether personnel of a unit of the National Guard of the State of Tennessee, which had not been called to active federal service, were employees of the United States within the meaning of the Federal Tort Claims Act so as to render the United States liable for the alleged negligence of a driver in a truck convoy returning from annual field training.

STATUTES INVOLVED

Section 2671 of the Judicial Code, as amended, 63 Stat. 106, 28 U.S.C., Supp. V, 2671, provides:

> As used in this chapter [Tort Claims Procedure] and sections 1346 (b) and 2401 (b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Section 58 of the National Defense Act of 1916, as amended, 48 Stat. 155, 32 U.S.C. 4a, provides (as it appears in the United States Code), in pertinent part:

The National Guard of the United States is established. It shall be a reserve component of the Army of the United States and shall consist of those federally recognized National Guard units, and organizations, and of the officers, warrant officers, and enlisted members of the National Guard of the several States,, Territories, and the District of Columbia, who shall have been appointed, enlisted and appointed, or enlisted, as the case may be, in the National Guard of the United States, as hereinafter provided, and of such otherr officers and warrant officers as may bee

> appointed therein as provided in section 111 hereof [32 U.S.C. 81]; *Provided,* That the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States, Territories, and the District of Columbia, as provided in this Act: * * *.

STATEMENT

This case involves a claim for personal injuries allegedly suffered on account of the negligence of personnel of the National Guard of the State of Tennessee returning in a convoy of trucks from annual field training at Fort Jackson, South Carolina. Petitioner's injuries were suffered on August 27, 1949, at Athens, Georgia, as a result of a collision between a civilian automobile and a truck which was a part of the convoy (R. 3-4). The truck was the property of the United States and had been assigned to the Tennessee National Guard pursuant to applicable provisions of law (R. 23). It was driven by a sergeant of the 730th Ordnance Maintenance Company of the Tennessee National Guard, and the convoy was under the command of a lieutenant colonel of the Tennessee National Guard (R. 33-34). Neither the 730th Ordnance Maintenance Company of the Tennessee National

Guard, the sergeant, nor the lieutenant colonel were in the active federal military service of the United States at the time of the accident (R. 45-46, 33, 34).

The 730th Ordnance Maintenance Company, along with other units of the Tennessee National Guard, had been ordered to participate in the annual field training at Fort Jackson by orders issued on July 27, 1949, from the Military Department of Tennessee, Office of the Adjutant General, at Nashville, Tennessee (R. 37-43). Disbursement of federal funds necessary for the payment, subsistence, transportation, and other proper expenses of those units of the Tennessee National Guard during the annual field training had been authorized by the Chief of the National Guard Bureau, Department of the Army, on July 15, 1949, pursuant to provisions of Section 94 of the National Defense Act, 32 U.S.C. 63 (R. 43-45). At the time of the accident, the annual field training at Fort Jackson had been completed, and the 730th Ordnance Maintenance Company was returning pursuant to its orders to its home station at Jackson, Tennessee (R. 3, 35).

Petitioner instituted this suit against the United States in the District Court for the Middle District of Georgia, seeking to recover $50,000.00 as damages for the alleged injuries suffered (R. 2-8). Petitioner filed requests for admissions (R. 12-17, 19-20), but the District Court sustained objections

to the requests on the ground that they were not designed to discover facts which would in any event be relevant, material, or admissible (R. 29-30). The United States filed a motion for summary judgment (R. 10-11) which the court granted, holding that the persons whose alleged negligent acts and omissions formed the basis of petitioner's complaint were not employees of the United States within the meaning of the Federal Tort Claims Act (R. 28-29). The Court of Appeals affirmed in a *per curiam* opinion on the authority of three of its previous decisions (R. 50).

ARGUMENT

Petitioner here challenges a decision which is clearly correct and supported, without exception, by every one of the numerous decisions of the district courts and courts of appeals in cases of this sort. The basic fallacy in petitioner's position, permeating both his pleadings in the district court and the statement of the case as well as the argument of his petition here,[1] is an erroneous view of the relationship which exists between the United States and the National Guards of the several states—a view which is contrary to and in conflict

[1] The district court properly disposed of this case on a motion for summary judgment. Statements of erroneous legal conclusions do no constitute allegations sufficient to raise issues of fact on a motion for summary judgment. Cf. *Silberschein* v. *United States*, 266 U.S. 221, 225.

with that established by the statutes and the Constitution of the United States.

1. The National Guards of the several states are the militia recognized in Article I, Section 8, clauses 15 and 16, of the Constitution. The history of the development of the National Guard from the disorganized and often undisciplined home-defense force which was the early militia has been a history of zealous protection of the states' control over their military forces against what were believed to be attempts to "federalize" the National Guard.[2] The result is that, although the process of development of the National Guard to an effective reserve component of the Army of the United States (Section 58 of the National Defense Act of 1916, as amended (*supra*, pp. 3-4); 50 U.S.C.A. 1111, 1112) has been one of increased exercise by Congress of its Constitutional power "To provide for organizing, arming, and disciplining" of the militia (U. S. Const. Art. I § 8, cl. 16), it is clear that the National Guard of a state still remains a state organization except when called into active federal service.

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[2] For a history of the statutes relating to the National Guard and its predecessors, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940); Colby and Glass, *The Legal Status of the National Guard*, 29 Va. L. Rev. 839 (1943). For the most recent assurances that state control over the National Guard has not been impaired or the National Guard "federalized", see S. Rep. No. 1795, 82d Cong., 2d Sess., on the Armed Forces Reserve Act of 1952, pp. 11, 43.

Section 58 of the National Defense Act, as amended, 48 Stat. 155, 32 U.S.C. 4a (*supra*, pp. 3-4), which was in force at the time this case arose,[3] specifically provided that:

> * * * the members of the National Guard of the United States shall not be in the active service of the United States except when ordered thereto in accordance with law, and, *in time of peace, they shall be administered, armed, uniformed, equipped, and trained in their status as the National Guard of the several States, Territories, and the District of Columbia* * * *. [Italics added.]

Certain qualifications for federal recognition of National Guard officers are established by law (32 U.S.C. 111-115), but Article I, Section 8, clause 16, of the Constitution specifically reserves to the states the power of appointment of officers, and Section 38 of the National Defense Act, as amended, 48 Stat. 155, 32 U.S.C. 20, provided that:

> Officers of the National Guard of the United States, while not on active duty, *shall not*, by reason solely of their appointments, oaths, commissions, or status as such, or any duties

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[3] After this case arose, Section 58 of the National Defense Act was repealed by the Armed Forces Reserve Act of 1952, 66 Stat. 481, 505. Similar provision was made, however, in Section 709 of that Act. 50 U.S.C.A. 1119.

> or functions performed or pay or allowances received as such, *be held or deemed to be officers or employees of the United States,* or persons holding any office of trust or profit *or discharging any official function under or in connection with any department of the Government of the United States.* [Italics added.][4]

That the state National Guards remain under state control while not in active federal service is manifest from the authority which the states exercise over these military forces. Although Section 61 of the National Defense Act, as amended, 32 U.S.C., Supp. V, 194, prohibits states from maintaining troops in time of peace other than in accordance with the organization prescribed by that Act, it specifically provides that:

> Nothing contained in this Act shall be construed to limit the rights of the States in the use of the National Guard within their respective borders in time of peace * * *.

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[4] It is significant that this provision was added by Section 4 of the Act of June 15, 1933, 48 Stat. 155, at the same time that there occurred "the complete legislative reorganization" of the National Guard which petitioner claims (Pet. 15-16) so altered the traditional relationship between the United States as to render inapplicable the long line of cases holding National Guardsmen, while not on active duty, to be employees or agents of the states (*infra*, pp. 16-17).

This section was repealed by the Armed Forces Reserve Act of 1952, 66 Stat. 481, 505, but a similar provision was made in Section 246 of that Act, 50 U.S.C.A. 981.

The states may, and frequently do, use their National Guards to enforce state laws and to maintain peace and order. Both officers and enlisted personnel are required to take an oath promising to obey the orders of the Governor of the state. 32 U.S.C. 112, 123.[5] And, as mentioned above, the Federal Constitution reserves to the states all authority over the appointment of officers. Thus, the Adjutant General of Tennessee, who issued the orders under which the 730th Ordnance Maintenance Company took part in the annual field training, was appointed by the Governor of that State. And the United States Property and Disbursing Officer, upon whose authority and actions petitioner puts misplaced reliance (Pet. 4, 11), was appointed by the Governor of Tennessee, subject to the approval of the Secretary of the Army. 32 U.S.C. 49.[6] Moreover, the states have the right

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[5] The required oath of allegiance is to both the United States and the state and the promise is to obey the orders of the President of the United States and those of the Governor "* * * because the Governor is commander in chief of the National Guard until Congress declares an emergency to exist and the guard becomes an actual part of the National Army, when the President becomes commander in chief." *Bianco* v. *Austin*, 204 App. Div. 34, 197 N.Y. Supp. 328, 330-331.

[6] Considering that the duties of this office consist of accounting, bookkeeping, and fiscal matters relating to the aid and benefit extended to the Tennessee National Guard and the material and equipment issued to it (see 32 U.S.C. 49), it is clear that this officer's activities have no relevance to the cause of action asserted here.

to determine the location of units and headquarters of the National Guard within their borders (32 U.S.C. 6), and it is expressly provided that "* * * no change in allotment, branch, or arm of units or organizations wholly within a single State will be made without the approval of the governor of the State concerned." 32 U.S.C. 5.

It is true that certain standards are established by federal law for the instruction, training, and discipline of the state National Guards (32 U.S.C. 61-76), that provision has been made for the issuance of arms, equipment, material, uniforms, etc., to the state National Guards (32 U.S.C. 33), and that a sum of money is annually appropriated for payment out of the United States Treasury for their support. 32 U.S.C. 21. However, the only sanction to enforce compliance by the states with the standards established by the United States is the withdrawal of federal recognition and entitlement to the aids and benefits offered by the United States. 32 U.S.C. 24.

As this review of the statutory relationship between the National Guard and the United States shows, the National Guard possesses a dual character. It is both a state military organization and a reserve component of the Army of the United States. But the definition of the relationship between the National Guard and the United States, set forth in statutes which reflect strong and constructive forces in the Republic's history,

leaves no doubt that members of the National Guard are only to be considered as in the active service of the United States when ordered thereto in accordance with law, and that members of the National Guard receive their training in the status of state National Guardsmen. And it is equally clear that, in this case, neither of the two then existing statutory authorities for calling the 730th Ordnance Maintenance Company into active federal service (32 U.S.C. 81 and 50 U.S.C. App. 301) had been exercised and that that unit participated in the annual field training at Fort Jackson in its status as an organization of the Tennessee National Guard.

2. Petitioner's suggestion (Pet. 10, 14-15) that the indisputable state character of the Tennessee National Guard can be avoided on the basis of the intangible benefit accruing to the United States from the training received by the National Guard is without merit. Although the benefit received by a principal from the acts of his agents may be a justification or the underlying rationale for imposing liability on the principal, the receipt of benefits alone is not sufficient to establish the relationship of principal-agent or employer-employee. And the liability of the United States under the Federal Tort Claims Act is limited to responsibility for the conduct of an employee or official. *United States* v. *Campbell*, 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957;

United States v. *Eleazer,* 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903; *United States* v. *Sharpe,* 189 F. 2d 239 (C.A. 4); *United States* v. *Hull,* 195 F. 2d 64, 67 (C.A. 1); *Rutherford* v. *United States,* 73 F. Supp. 867 (E.D. Tenn.), affirmed *per curiam,* 168 F. 2d 70 (C.A. 6); *Cropper* v. *United States,* 81 F. Supp. 81 (N.D. Fla.); *Long* v. *United States,* 78 F. Supp. 35 (S.D. Calif.). Nowhere in the record of this case do there appear factual allegations of control sufficient to establish liability on the part of the United States under the *respondeat superior* doctrine. Moreover, as outlined above, the statutory relationship between the United States and the state National Guards effectively precludes such control. Petitioner apparently mistakes for control what were simply acts of assistance through the provision of training facilities, equipment, and funds.[7] However, as stated by the District Court for the Northern District of Alabama in *Glasgow* v. *United States,* 95 F. Supp. 213, 214:

> Not every person who accepts or is eligible to receive its bounty is an employee of the

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[7] It is in this connection that petitioner urges the applicability of the "loaned servant" doctrine (Pet. 12). But, as shown above, it is clear that the 730th Ordnance Maintenance Company participated in the annual field training solely in its capacity as a unit of the Tennessee National Guard. Moreover, attendance at a camp for instruction is clearly distinguishable from the usual situation in which the loaned servant doctrine is applicable.

> Government. In an era of subsidies and grants in aid, such a conclusion would be a complete nonsequitur.

Cf. *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954 (assistance rendered to a local venereal disease control project); *Lavitt* v. *United States,* 177 F. 2d 627 (C.A. 2) (actions of county association inspectors indirectly benefiting the United States).

Nor is petitioner upon sound ground in relying upon this Court's decisions in *United States* v. *Yellow Cab Company,* 340 U.S. 543, and *United States* v. *Aetna Casualty & Surety Company,* 338 U.S. 366. Unlike those cases, this case involves no question of the extent of the waiver of sovereign immunity from suit on recognized liabilities. The question presented here is whether the United States assumed a new liability by making the guardsmen involved employees of the United States within the meaning of the Federal Tort Claims Act. The fact that some state governments have not seen fit to waive their sovereign immunity from suit for the negligent acts of members of their military organizations[8] certainly provides no basis for imposing liability on the United States or for transforming state guardsmen into federal employees.

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[8] Not all states refuse to accept such liability. See the decisions of the various state courts cited *infra,* pp. 16-17.

3. In view of the clarity with which the status of National Guardsmen is defined, it is not surprising to find that, without exception,[9] every court which has considered the question has held that guardsmen who have not been called to the active service of the United States, even though undergoing annual field training, are not employees of the United States within the meaning of the Federal Tort Claims Act. *Dover* v. *United States,* 192 F. 2d 431 (C.A. 5); *Williams* v. *United States,* 189 F. 2d 607 (C.A. 10); *O'Toole* v. *United States,* 106 F. Supp. 804 (D. Del.); *Satcher* v. *United States,* 101 F. Supp. 919 (W.D. S.C.); *Glasgow* v. *United States,* 95 F. Supp. 213 (N.D. Ala.); *Mackay* v. *United States,* 88 F. Supp. 696 (D. Conn.); see also the Appendix, *infra,* p. 18, listing twenty-nine unreported cases in which a similar conclusion was reached.[10] Indeed, it was

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[9] The cases holding the United States liable for the torts of National Guard unit caretakers, *Elmo* v. *United States,* 197 F. 2d 230 (C.A. 5); *United States* v. *Duncan,* 197 F. 2d 233 (C.A. 5); *United States* v. *Holly,* 192 F. 2d 221 (C.A. 10), present no exception. In earlier opinions in ordinary guardsmen cases, the Courts of Appeals for the Fifth and the Tenth Circuits carefully distinguished the caretaker cases, on grounds peculiar to unit caretakers, from previous decisions holding that the United States was not liable for the torts of National Guardsmen, 197 F. 2d at 231; 192 F. 2d at 224.

[10] Petitioner has called upon the Government to make known to this Court the number of cases in which claims have been presented on account of the alleged torts of National Guardsmen (Pet. 8-9). We have been informally advised by the National Guard Bureau, Department of the

well established before the passage of the Federal Tort Claims Act by decisions of both federal and state courts that such National Guardsmen were not officers, employees or troops of the United States but the troops, employees or agents of the states. *United States* v. *Dern,* 74 F. 2d 485 (C.A. D.C.); *Oregon-Washington Railroad & Navigation Co.* v. *United States,* 60 C. Cls. 458; *Illinois Central Railroad Co.* v. *United States,* 60 C. Cls. 499; *Alabama Great Southern Railroad Co.* v. *United States,* 49 C. Cls. 522; *Bianco* v. *Austin,* 204 App. Div. 34, 197 N.Y. Supp. 328 (App. Div., 1st Dept.); *Gibson* v. *State,* 19 N.Y.S. 2d 405, 173 Misc. 893 (C. Cls. N.Y.), affirmed 21 N.Y.S. 2d 362; *Spence* v. *State,* 288 N.Y. Supp. 1009, 159 Misc. 797 (C. Cls. N.Y.); *Dicicco* v. *State,* 273 N.Y. Supp. 937, 152 Misc. 541 (C. Cls. N.Y.); *Lind* v. *Nebraska National Guard,* 144 Neb. 122, 12 N.W. 2d 652; *Nebraska National Guard* v. *Morgan,* 112 Neb. 432, 199 N.W. 557; *Baker* v. *State,* 200 N.C. 232, 156 S.E. 917; *Globe Indemnity Co.* v. *Forrest,* 165 Va. 267, 182 S.E. 215; *State* v. *Industrial Commission,* 186

Army, that during the calendar year 1952, a total of 126 such claims were received. Of these, 106 concerned claims related to activities of the National Guard while attending camps of instruction or annual field training. Although this number may not be as impressive as petitioner apparently expected, it is sufficient to give added emphasis to the uniformity with which every court presented with the question has held that National Guardsmen undergoing annual field training are not employees of the United States within the meaning of the Federal Tort Claims Act.

Wisc. 1, 202 N.W. 191; see also 19 Comp. Gen. 326; 17 Comp. Gen. 333. And, in view of this well established principle, it is not without significance that Congress omitted National Guardsmen from the definition of "employee" in the Federal Tort Claims Act. Cf. *Feres* v. *United States,* 340 U.S. 135, 139, 144; *United States* v. *Wittek,* 337 U.S. 346, 365-366; *Kirschbaum Co.* v. *Walling,* 316 U.S. 517, 522; *Keck* v. *United States,* 172 U.S. 434, 446.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

WARREN E. BURGER,
Assistant Attorney General.

SAMUEL D. SLADE,
CORNELIUS J. PECK,
Attorneys.

MARCH, 1953.

APPENDIX

UNREPORTED CASES HOLDING THE UNITED STATES NOT LIABLE FOR THE TORTS OF NATIONAL GUARDSMEN

Cosme v. United States	Civil No.	5555	(D. Puerto Rico)	Summary Judgment Granted	9/ 6/50
Pogue v. United States	" "	2746	(E.D. Okla.)	" " "	10/10/50
Pogue v. United States	" "	2745	(E.D. Okla.)	" " "	10/10/50
Durham v. United States	" "	1058	(W.D. Texas)	" " "	11/13/50
Onchen v. United States	" "	1087	(W.D. Texas)	" " "	11/13/50
Lowrey v. United States	" "	1086	(W.D. Texas)	" " "	11/13/50
Herman Dover v. United States	" "	3928	(N.D. Ga.)	" " "	2/17/51
Herman Dover v. United States	" "	3929	(N.D. Ga.)	" " "	2/17/51
Mrs. T. H. Dover v. United States	" "	3930	(N.D. Ga.)	" " "	2/17/51
Thomas v. United States	" "	5215	(D. Md.)	" " "	3/ 9/51
Stevens v. United States	" "	115-49	(D. Nebr.)	" " "	6/ 9/51
Heine and Calif. Cas. Indem. Exch. v. U.S.	" "	30398	(N.D. Calif.)	Motion to Dismiss Granted	8/23/51
Herndon v. United States	" "	1212	(E.D. Va.)	Summary Judgment Granted	9/ 7/51
Pingel v. United States	" "	6526	(N.D. Ohio)	" " "	9/17/51
McCarthy v. United States	" "	504	(E.D. Ky.)	" " "	3/13/52
Saxon v. United States	" "	3164	(E.D. La.)	" " "	3/19/52
R. G. McCranie v. United States	" "	174	(M.D. Ga.)	" " "	3/22/52
Mrs. F. R. Oxford v. United States	" "	177	(M.D. Ga.)	" " "	3/22/52
F. Oxford v. United States	" "	178	(M.D. Ga.)	" " "	3/22/52
Brittain v. United States	" "	2406	(E.D. S.C.)	" " "	4/ 7/52
Airey v. United States	" "	31-304	(N.D. Calif.)	" " "	5/12/52
Marler v. United States	" "	3035	(W.D. La.)	" " "	6/25/52
Hartford Fire Ins. Co. v. U.S.	" "	52-199	(D. Mass.)	" " "	7/ 2/52
Larkin v. United States	" "	3993	(N.D. N.Y.)	" " "	7/10/52
Kossuth v. United States	" "	3994	(N.D. N.Y.)	" " "	7/10/52
O'Toole v. United States	" "	1343	(D. D.C.)	" " "	7/14/52
Brown v. United States }	Consolidated Cause				
Gross v. United States }	Civil No.	51 C 1043	(N.D. Ill.)	Motion to Dismiss Granted	9/25/52
Nork v. United States	" "	52 C 1461	(N.D. Ill.)	" " "	10/24/52

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